BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2018-358-WS

In the Matter of: **Verified Application of Carolina Water Service, Incorporated for Approval of Annual Rate Adjustment Mechanisms and Petition for an Accounting Order to Defer Expenses**	**REPLY TO ORS RESPONSE TO OBJECTION AND MOTION TO STRIKE**

Pursuant to S.C. Code Ann. Regs. 103-829(A), Blue Granite Water Company (the "Company") hereby replies to the response of the South Carolina Office of Regulatory Staff ("ORS") to the Company's objection and motion to strike a portion of the surrebuttal testimony of ORS witness Matthew P. Schellinger, II. Because a portion of Mr. Schellinger's surrebuttal testimony improperly introduces novel issues that are not discussed in testimony previously offered in this proceeding, such testimony should be stricken.

ARGUMENT

By withdrawing a portion of the offending testimony in its response, ORS appears to concede that at least some of its offered surrebuttal testimony (1) improperly introduces new issues on surrebuttal, (2) relies upon testimony offered by other witnesses in unrelated proceedings, and/or (3) is inadmissible lay opinion testimony under S.C. Rule of Evidence 701. However, instead of withdrawing all of the testimony that offends these legal standards,[1] ORS offers to

[1] *Daniel v. Tower Trucking Co.*, 32 S.E.2d 5 (S.C., 1944); *State v. Farrow*, 332 S.C. 190,

withdraw only a portion. The Company asks that this Commission enforce these standards by striking all of the offending surrebuttal testimony, beginning on page 14 at line 10 and ending on page 15 at line 15. The Company agrees with ORS that the Commission should receive "the most context and clearest picture of what the Company seeks." However, to ensure the integrity of proceedings before the Commission, all parties and the Commission must abide by the S.C. Rules of Evidence and associated binding caselaw.

ORS argues that the offending testimony does not introduce novel issues on surrebuttal because it seeks to rebut Company witness Robert Hunter's testimony that the proposed mechanism is equitable and reasonable. This is incorrect, and the tactic is contrary to S.C. caselaw. Schellinger's surrebuttal testimony discusses "regulatory mechanisms" that "shift risk," issues that are not discussed in any of Mr. Hunter's filed testimony. Were ORS interested in proffering testimony on these issues, it should have done so in its "case in chief"—i.e., in its direct testimony filed on May 30, 2019.[2] As discussed in the Company's Motion to Strike, raising an issue for the first time on surrebuttal unfairly deprives other parties the opportunity to respond and prejudicially influences the decision-making of the Commission, and, for these reasons, is forbidden by S.C. caselaw. For these reasons alone, the testimony should be stricken.

ORS also argues that, because witness Hunter discussed regulatory lag in an unrelated *ex parte* briefing, the Company is not unfairly prejudiced when ORS introduces other, novel issues on surrebuttal in a contested proceeding. This is also contrary to S.C. caselaw. First, the legal

194 (S.C. App., 1998); S.C. Rule of Evidence 701; *State v. Westmoreland*, 421 S.C. 410, 419 (S.C. App., 2017).

[2] *Daniel v. Tower Trucking Co.*, 32 S.E.2d 5, 10 (S.C., 1944) (a party may offer rebuttal testimony "provided it is in the nature of true reply and not such as should have been offered in the case in chief").

standard requires that surrebuttal testimony be offered only to rebut evidence offered **during that proceeding** by an opposing party.[3] That Mr. Hunter discussed regulatory lag in an unrelated *ex parte* briefing does not "open the door" to an ORS witness discussing alternative ratemaking methodologies in surrebuttal testimony offered during a contested proceeding. Should ORS have had an interest in presenting its own view of these issues, it could have requested its own *ex parte* briefing before the Commission pursuant to S.C. Code Ann. § 58-3-260(C)(6)(a)(iv).[4] It could also have discussed these issues in its direct testimony filed on May 30, 2019. It is, however, contrary to S.C. precedent to introduce discussion of these issues on surrebuttal during a contested proceeding.

ORS cites *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282 (1992) for the proposition that "the Commission sits as the trier of facts, akin to a jury of experts," and suggests that the Commission determine what weight to give this inadmissible testimony. It is crucial to the parties' rights to due process and a fair proceeding that the Commission—as the "trier of facts"—be protected from exposure to evidence that would unduly and improperly influence its opinion.[5] For that reason, the Company renews its objection to the offending surrebuttal testimony and asks this Commission to enter an order striking it.

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[3] *State v. Farrow*, 332 S.C. 190, 194 (S.C. App., 1998) ("We thus hold the reply testimony . . . was improper because it was not presented to rebut evidence adduced by Farrow.").

[4] We would also note that ORS's lack of an objection to the Company's discussion of alternative ratemaking methodologies at the *ex parte* briefing in question—which was held fewer than twenty business days prior to the then-scheduled hearing—belies its position that the pass-through mechanism is an "alternative ratemaking methodology." *See* S.C. Code Ann. § 58-3-260(C)(6)(a)(vi).

[5] *See Winget v. Winn-Dixie Stores, Inc.*, 242 S.C. 152, 130 S.E.2d 363 (S.C., 1963) (finding reversible error where the lower court denied a motion to strike and permitting it to be left in the case "for what it is worth").

Finally, to the extent the Commission considers the arguments put forth by Mr. Schellinger in his surrebuttal testimony likening the pass-through mechanism to "a form of alternative ratemaking" that "shifts risk" to customers, this position is patently fallacious. As explained in the Company's Amended Application, the proposed pass-through mechanism—similar to those implemented by other water and wastewater utilities—merely passes through third party providers' costs for which the Company earns no return and for which a deferral has been in place. The pass-through mechanism is designed to be, and is in fact, earnings-neutral for the Company, and there is therefore no risk-shifting. Instead of shifting risk to customers, the mechanism would actually benefit customers by significantly lessening monthly deferrals going forward and mitigating rate shock once the Company begins to recover on the deferred balances.

WHEREFORE, the Company objects and moves to strike the testimony of ORS witness Schellinger as set forth above.

s/Samuel J. Wellborn
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July 8, 2019

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IN RE:	)	
	)	
Verified Application of Carolina Water Service, Inc. for Approval of Annual Rate Adjustment Mechanisms and Petition for an Accounting Order to Defer Expenses	)	CERTIFICATE OF SERVICE

This is to certify that I, Samuel Wellborn, an attorney with the law firm of Robinson Gray Stepp & Laffitte, LLC have this day served a copy of **Blue Granite Water Company's Reply to ORS Response to Objection and Motion to Strike** in the foregoing matter via electronic mail as follows:

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Dated at Columbia, South Carolina this 8th day of July, 2019.

s/Samuel J. Wellborn